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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 627

FRANK E. MONDAY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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THE UNITED STATES;

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner and plaintiff below prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above cause on June 3, 1959.

Opinions Below

The opinion of the United States Court of Claims is set forth on pages 9-11 of the Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Claims was finally entered on October 7, 1959. The jurisdiction of the Court is invoked under Section 1255 of U.S.C.A. as amended by the Act of September 1, 1948.

Questions Presented

This case involves three questions. First, whether the letter of decision (dated March 13, 1956) by the Agency notifying the petitioner here as employee was procedurally defective since it did not contain findings regarding the charges preferred. Second, whether the failure of the Agency to make available to the petitioner here as employee at the Grievance Hearing all documents on which the personnel removal charges were based, was a violation of the due process clause of the 5th Amendment of the Constitution of the United States. Third, whether the Court of Claims erred in holding that the fifty day period from the date of the final decision of the Agency to the date of filing of employee's appeal with the Civil Service Commission was a bar to review although the Civil Service Commission was willing to waive the ten day limitation appeal period and consider the fifty day period as timely because of lack of notice to the employee of his appeal rights had the employee not been considered guilty of laches by the Commission.

Statutes and Regulations Involved

The pertinent statute and regulations are the following:

a) Statute

5 USCA Sec. 652(a)

"No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer."

b) Regulations

5 Code Fed. Regs. Sec. 9.102(a)(1)

"* * * If the employee answers the charges, his answer must be considered by the agency. Following consideration of the answer, the employee shall be furnished at the earliest practical date with a written decision. If the agency determines that removal or other action is warranted, the employee shall be notified in the decision of the reasons for the action taken and its effective date."

5 Code Fed. Regs. Sec. 9.106(b)(3)

"No case will be investigated under this paragraph unless the request for such investigation is received by the Commission within ten (10) days after the effective date of separation, suspension, reassignment or demotion. This time limit may be extended in the discretion of the Commission only upon a showing by the employee that circumstances beyond his control prevented him from filing a request for an investigation within the prescribed ten (10) days. * * *"

Statement of the Facts

Petitioner was employed as a civilian classified status employee of the Department of the Air Force from 1949 to March 16, 1956, when he was removed from his position as an Air Intelligence Research Analyst GS-7. He appealed the removal action though the Agency Grievance procedure and on March 4, 1957, he received a final decision from the Department of the Air Force affirming his removal. Although petitioner was not informed of his right of appeal to the United States Civil Service Commission, he filed an appeal with the Commission 50 days later on April 23, 1957.

On May 1, 1957, the Commission advised in a decision by the Appeals Examining Office that the 10 day limitation period could be waived for a circumstance beyond the control of the appellant and the petitioner's failure to be notified of his right to appeal to the Commission

could be considered such a circumstance. However, the Commission ruled the petitioner was guilty of laches because the Commission found the lapse of time was to run from March 16, 1956, the date of petitioner's termination of employment rather than from March 4, 1957, the date of the final decision by the Agency.

Petitioner appealed to the Board of Appeals and Review which Board refused to grant the appeal, thus affirming the action of the Appeals Examining Office in the Board's decision of May 17, 1957.

On September 17, 1957, petitioner filed his action in the Court of Claims seeking to recover back pay from March 16, 1956, based on 28 U.S.C. Sec. 1491.

Argument

1. ***The decision of the Agency to dismiss petitioner was procedurally defective and is subject to Mulligan v. Andrews.***

In *Mulligan* v. *Andrews*, 211 F (2d) 28 (1954) the United States Court of Appeals for the District of Columbia held that a decision of an Agency to remove an employee after charges have been preferred and an answer to the charges has been filed by the employee, must disclose which of the charges if any brought by the agency are relied on for removal. The Court held that "only findings upon such charges, specifically identified, can constitute the reason required in the adverse decision." In the *Mulligan* case the letter of decision from the Agency to the employee stated that the employee was found unsuitable and the decision made no statement whether the specific charges were sustained. See also *Kutcher* v. *Higley* 235 F (2d) 505 (CCA-D.C. 1956)

In the instant case the letter of decision by the Agency of March 13, 1956 contained no statement therein advising that the Agency had sustained the charges against the petitioner. Petitioner was merely told that his replies

were not considered a satisfactory explanation of the charges that his work had been deficient in both quantity and quality. This statement was made in the third paragraph of the letter of decision dated March 13, 1956 while in the first paragraph thereof was the following statement: "You are hereby notified that final decision has been made to remove you from the service, effective 16 March 1956. It has been determined that your removal is for such cause as will promote the efficiency of the service."

Under these circumstances, it is submitted that the removal of the petitioner by the Agency may have been for some other reason than that indicated in the original charges. It is noteworthy that the Government in its reply brief in the Court of Claims in paragraph five thereof referred to an alleged falsification by petitioner of a Form 57 filed with the Department of the Air Force.

In view of the number of specific allegations of inefficiency made by the Agency in the original charges, it was mandatory for the agency to advise petitioner what allegations made by the Agency, all or part thereof, were sustained in the findings of the Agency after reviewing petitioner's reply to the original statement of charges.

The decision of the U. S. Court of Appeals in *Green* v. *Baughman* 243 F. (2d) 610, certiorari denied, 355 U.S. 819, is not applicable to the factual situation here, since in the *Green* case the agency in its letter of removal referred to the fact that the charges were sustained. The Court said at p. 612, "We think direct references to the charges as sustained was a sufficient statement of the reasons for the discharge."

Petitioner submits that failure of the Agency to make a finding with respect to the charges brought by the Agency following petitioner's reply thereto was a procedural defect. Orderly administrative procedure requires that after extensive charges are made, and reply

by the employee to the charges is made, a finding with respect to the charges is mandatory to meet the requirements of Section 9.102(a)(1) of the Civil Service Regulations (5 CFR Sec. 9.102(a)(1)) that the decision must contain the reasons for the removal.

2. The denial of documents to petitioner and his counsel by the Agency was contrary to the due process clause of the 5th Amendment.

Petitioner was denied access to certain of the documents which the Agency alleged were inefficiently processed by the petitioner. Some of the documents had been destroyed or were not available to petitioner at the time that he filed his reply to the charges. By affidavit attached to his reply brief in the Ct. of Claims petitioner has stated that full records pertaining to the charges were not made available to him and to his counsel. Of a total of 64 documents only 11 of the documents were made available at the time of the grievance hearing to petitioner and his counsel.

Charges based on evidence not produced for examination of petitioner and his counsel violate the due process clause of the 5th Amendment. It was impossible for petitioner and his attorney to defend against allegations of improper processing of documents withheld from their examination. Even should it be true that these matters were of a confidential nature, it does not excuse the failure of the Government to confront the employee with the evidence on which his discharge was based. There are no exceptions under the Lloyd-La Follette Act, as amended, 5 USCA 652(a), which permit the Agency to penalize an employee on the basis of secret evidence withheld from the employee. Petitioner was entitled to have the documents which were the subject of the charges brought forward at the time the charges were filed so that petitioner might make an adequate reply and the documents should have been brought forward at the hearing so he

and his counsel could have reviewed this evidence at the hearing and made the evidence the subject of cross-examination. If the Agency did not wish to make the documents available, the charges based on these documents should have been withdrawn. See *Jencks* v. *United States* 353 U.S. 657.

3. Petitioner was not guilty of laches; the Civil Service Commission expressed a willingness to waive the ten day limitation period as petitioner was never notified of his right of appeal to the Commission.

As Government's Exhibit #12 in the Court of Claims is a letter from E. A. Dunton, Chief Appeals Examining Office, U. S. Civil Service Commission, dated May 1, 1957, addressed to Herbert S. Thatcher, Esq., then counsel for the petitioner. In the letter, Mr. Dunton was willing to concede that the Agency's failure to notify petitioner of his appeal rights to the Civil Service Commission was a circumstance beyond his control and therefore was a basis for waiving the ten day limitation period on appeals from the Agency to the Civil Service Commission. But the Commission through Mr. Dunton ruled that the petitioner was barred by laches because the Commission considered the ten day period would commence to run from the termination of employment date of March 16, 1956 rather than from the date of the final decision of the Agency's grievance procedure of March 4, 1957 (Government's Exhibit in Court of Claims #9).

If the provisions of Section 9.106(b)(3) of the Code of Federal Regulations for the Civil Service Commission (5 CFR, Part 9, 1949 ed.) are interpreted in the light of orderly administrative procedure the ten day period referred to should be computed from the date of *final* action of the Agency separating the employee. Thus, it is submitted that the Commission erred in holding that plaintiff was guilty of laches and it is noted that the Court of Claims has considered the time for filing an appeal to

run from March 4, 1957. However, the Court below has made the fifty day period from March 4, 1957 to April 23, 1957, the date that petitioner filed the appeal with the Commission, a matter of bar to petitioner's right of review although the Commission indicated it would waive the ten day period and accept the appeal within the fifty days because of lack of notice.

Thus it is submitted that petitioner was not guilty of laches (which was confirmed by Government in its reply brief under paragraph 5 in the Court of Claims) and the petitioner was not barred from review by the Commission and the Court below, since the Commission was willing to waive the ten day requirement because of the lack of notice to the petitioner of his right of appeal but the Commission erroneously considered petitioner guilty of laches based on a mistaken computation of time from March 16, 1956 instead of March 4, 1957.

Conclusion

Wherefore, petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Claims and upon such review the judgment of said Court of Claims be vacated, reversed and set aside, and that this case be remanded to said Court with instructions to proceed in accordance with the views of this Court.

David M. Klinedinst
Attorney for Petitioner

IN THE UNITED STATES COURT OF CLAIMS

No. 439-57

(Decided June 3, 1959)

FRANK E. MONDAY v. THE UNITED STATES

Mr. David M. Klinedinst for the plaintiff. *Mr. Joseph G. Weeda* was on the brief.

Mr. Francis J. Steiner, Jr., with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

BRYAN, *District Judge*, sitting by designation, delivered the opinion of the court:

Discharged on March 16, 1956, for inefficiency, as a civilian employee of the Department of the Air Force, the plaintiff seeks payment of his salary from that date, on the averment that his dismissal was unlawful. The illegality, he says, consisted of the defectiveness of the removal procedure, arbitrariness and capriciousness in the decision, and a violation of the Performance Rating Act of 1950, post. Cross-motions for summary judgment tender the issue; we think the defendant should prevail.

Contrary to the suggestion of the plaintiff, the record clearly discloses that the Government acted under the Lloyd-La Follette Act of 1912, as amended, 5 USCA 652(a),* rather than in pursuance of the Performance

* The pertinent terms are these:

No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for

Rating Act,* 5 USCA 2005.* But, in any event, commencement under the Performance Act was not an irretrievable election ousting subsequent proceedings and judgment according to Lloyd-La Follette. Moreover, while the plaintiff is accurate in his charge of the omission of the notice prescribed by the Performance Act, a prosecution under Lloyd-La Follette need not satisfy the procedures of the Performance Act. *Jones* v. *Hobby*, D.C. cir. 223 F. 2d 345 (1955); *Thomas* v. *Ward*, D.C. cir. 225 F. 2d 953 (1955) *cert. den.* 350 U.S. 958; *Hoppe* v. *United States*, 136 C. Cl. 559, 565 (1956) *cert. den.* 355 U.S. 816; *Sells* v. *United States*, No. 559-57, decided this date.

There was rubrical adherence to the Lloyd-La Follette procedures. Detailed and demonstrative were the charges the agency presented, a full apprisal of the plaintiff of the deficiencies in the quality and quantity of his work during the preceding four months and more. Time to

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such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency. * * * ; and copies of the same shall be furnished upon request, to the person affected and to the Civil Service Commission. * * *

* The pertinent terms are these:

Each performance-rating plan shall provide for ratings representing at least * * * ; (2) unsatisfactory performance, which shall serve as a basis for removal from the position in which such unsatisfactory performance was rendered; * * *. No officer or employee shall be rated unsatisfactory without a ninety-day prior warning and a reasonable opportunity to demonstrate satisfactory performance.

answer was afforded initially, and then enlarged. Access to all pertinent records was granted him and ample opportunity to prepare his replies, even during working hours. Indeed, until this suit the availability of all desired records was unquestioned. A written decision followed promptly. It advised him that his responses were insufficient to refute the documented specifications of inefficiency. Surely this notice quailfied as "reasons given in writing" and of "charges sustained". 5 USCA 652(a); *Green* v. *Baughman*, D.C. cir. 243 F. 2d 610, 612 (1957) *cert. den.* 355 U.S. 819; *Hoppe* v. *United States*, *supra*, 136 C. Cl. 559.

He was allowed to appeal the agency determination through the appropriate review tribunals of the Air Force. There it was consistently approved. So, clearly, the decision to dismiss was neither hasty, nor arbitrary, nor capricious. But, more, though entitled to appeal within ten days to the Civil Service Commission from the Air Force's approval, March 4, 1957, the plaintiff did not perfect an appeal until April 23, 1957, a wait of some fifty days. The Commission declined the appeal as too late. Having neglected seasonably to pursue this administrative remedy, the plaintiff is actually not entitled to be heard here on his procedural complaints. *Bodson* v. *United States*, No. 402-56, decided March 5, 1958. Finally, his removal was Executive action, punctiliously observant of procedure, and the Court cannot review the right or wrong of it. *Keim* v. *United States*, 177 U.S. 290 (1900); *Eberlein* v. *United States*, 257 U.S. 82 (1921).

Judgment must be entered summarily on the defendant's motion, the plaintiff's motion denied, and his petition dismissed.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*, and JONES, *Chief Judge*, concur.

UNITED STATES COURT OF CLAIMS

No. 439-57

FRANK E. MONDAY v. THE UNITED STATES

CLERK'S OFFICE

Washington, D. C., October 7, 1959

To Attorney of Record and Assistant Attorney General, and Commissioner .....

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the plaintiff's motion for rehearing the following order: OVERRULED

Very truly yours,

WILLARD L. HART
Clerk, Court of Claims

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Office Supreme Court, U.S.
FILED
JAN 2 1960
JAMES R. BROWNING, Clerk

No. 627

In the Supreme Court of the United States

OCTOBER TERM, 1959

FRANK E. MONDAY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

SAMUEL D. SLADE,
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 627

FRANK E. MONDAY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Claims (Pet. 9) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 3, 1959. A timely motion for rehearing was denied on October 7, 1959. The petition for a writ of certiorari was filed on January 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether petitioner's claim, asserted in a suit for back pay, that his removal from a position in the classified civil service was procedurally defective was correctly held to be barred by petitioner's failure to take a timely appeal of his dismissal to the Civil Service Commission.

2. Whether the written decision of the Department of the Air Force, notifying petitioner of his dismissal from employment with that agency, complied with the requirements of the Lloyd-La Follette Act of 1912, Sec. 6, 37 Stat. 555, as amended, 62 Stat. 354, and with Civil Service Regulations.

3. Whether the court below had basis for finding that petitioner was permitted by the Air Force to examine all available documents pertinent to his dismissal.

STATUTES INVOLVED

The relevant statute and regulations are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

Petitioner was employed by the Department of the Air Force as a civilian employee, holding classified civil service status, from 1949 to 1956. By a letter dated February 21, 1956, the Air Force notified petitioner, who was then serving as an Air Intelligence Research Specialist, GS-7, that his work during the preceding six months had been deficient in quality and in quantity (D. Ex. 5). The letter, which was eight pages in length, set out in detail the deficiencies

with which petitioner was charged, and gave him seven days to reply to the charges (*ibid.*).

On February 23, 1956, petitioner answered the charges (D. Ex. 4). He was notified, by a letter of February 28, 1956, that his reply had been too general to be a sufficient answer (D. Ex. 3). He was told to prepare another reply and that, if he desired, documents on file would be made available to him (*ibid.*). On March 5, 1956, petitioner submitted his second reply to the charges (D. Ex. 2).

By a letter dated March 13, 1956, petitioner was notified that a final decision had been made to remove him from the service (D. Ex. 10). This letter referred specifically to the charges of inefficiency contained in the letter of February 21, and stated that, although petitioner's replies had been carefully considered, they were inadequate to rebut the charges which had been preferred (*ibid.*). Petitioner's separation for inefficiency became effective on March 16, 1956.

Petitioner appealed the removal action through Air Force procedures, and, on March 4, 1957, was notified of the Department of the Air Force's final decision to sustain his removal (D. Ex. 9).

Fifty days later, on April 23, 1957, petitioner filed an appeal with the Civil Service Commission on the ground that his dismissal had not been effected in compliance with the procedural requirements of the Lloyd-La Follette Act (D. Ex. 11). The Appeals Examining Office of the Commission refused to consider the appeal, holding it barred by laches (D. Ex. 12). The Commission noted that, under its regu-

lations, the requirement that appeals be filed ten days after the effective date of separation might be waived upon a showing by the appellant that circumstances beyond his control prevented him from filing a timely appeal. But it stated that, even assuming that the agency's failure to notify petitioner of the time limit for appeal to the Commission was a circumstance beyond petitioner's control, it was not such as would excuse his extensive delay in acquainting himself with the Commission's regulations and filing an appeal (*ibid.*). This refusal to entertain the appeal was affirmed by the Board of Appeals and Review of the Civil Service Commission (D. Ex. 14).

Petitioner thereupon brought this suit in the Court of Claims to recover back pay from the date of his dismissal, which, he alleged, had been unlawful and arbitrary. On June 3, 1959, the court granted respondent's motion for summary judgment. It held that petitioner's dismissal had not been arbitrary and that there had been full compliance with procedural requirements. The court noted further that, in any event, petitioner's complaints could not be judicially reviewed because he had failed to pursue seasonably the administrative remedy provided him. On October 7, 1959, petitioner's motion for rehearing was denied.

ARGUMENT

Petitioner has presented no question of general importance which would warrant review by this Court. His sole complaint is that, under the circumstances of this case, his dismissal was invalid and

that he is, therefore, entitled to recover his back pay. This contention cannot be considered because petitioner failed to make timely application for the appropriate administrative remedy. In any event, as the court below held, petitioner's dismissal was in accordance with Lloyd-La Follette procedures.

1. Petitioner filed a request with the Civil Service Commission for investigation of his removal more than one year after the date of his separation and fifty days after the final decision of the Air Force. The Commission refused to waive its ten-day limitation [1] stating that "due diligence on Mr. Monday's part would require that he had long since discovered the requirements of the Commission's regulations for himself and filed an appeal before this late date" (D. Ex. 12).

Petitioner urges that the Commission's action was based on an erroneous belief that the time for seeking its review began to run on March 16, 1956, the date of separation, rather than March 4, 1957, the date of the final agency action. This contention is not supported by the record. From the Commission's letter denying him review (D. Ex. 12) it is clear that

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[1] 5 C.F.R. 9.105(b)(3) (1949 ed.) (App. 10-11) of the Civil Service Commission's regulations, which was in effect at the time of petitioner's separation, provided that the Commission would not investigate an employee's removal unless the request for such an investigation was received by the Commission within ten days from the effective date of separation. This time limit might be extended in the discretion of the Commission upon a showing by the employee that circumstances beyond his control prevented him from filing within the prescribed ten days.

petitioner's delay was considered inexcusable whether the ten day period commenced to run on the former or the latter date. The Commission obviously deemed it unnecessary to determine that question since, in all events, there was no justification for the fifty-day delay following the final agency action.

Inasmuch as petitioner failed to exhaust his administrative remedies by filing a timely appeal with the Civil Service Commission, he cannot now challenge the validity of his dismissal in a suit for back pay in the Court of Claims. *Bodson* v. *United States*, 141 C. Cls. 532, 536; *Henry* v. *United States*, 139 C. Cls. 362, 366; cf. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41.

2. Under the Lloyd-La Follette Act of 1912, as amended, and Civil Service Regulations, a person in the classified civil service of the United States cannot be removed without being accorded, *inter alia*, a written decision by the employing agency, stating the reasons for his dismissal. 37 Stat. 555, 62 Stat. 354, 5 U.S.C. 652(a) (App. 9); 5 C.F.R. 9.102(a)(1) (1949 ed.) (App. 9-10).

Petitioner's contention that the Air Force's letter of decision, dated March 13, 1956, did not adequately indicate the basis for his dismissal is untenable. The charges against petitioner alleged that his work had been deficient in both quantity and quality for a period of six months. The agency was not required, as petitioner claims, to make a finding in its decision with respect to each of the numerous instances of inefficiency attributed to petitioner. In *Green* v. *Baughman*, 243 F. 2d 610 (C.A.D.C.), certiorari

denied, 355 U.S. 819, it was held that, where the charges preferred against an employee are sufficiently specific, a letter of decision stating simply that the charges brought against him have been sustained is adequate.[2] This rule is obviously reasonable and it is fully applicable here. The agency's letter of decision made it unequivocally clear that the charges of continuing inefficiency had not been satisfactorily met by petitioner, and that they constituted the grounds for his dismissal (D. Ex. 10).

3. Petitioner contends also that the Air Force denied him access to some of the documents which he allegedly had processed inefficiently and that this constituted a violation of his rights under the Fifth Amendment. The record shows, however, contrary to petitioner's assertion, that he was permitted to make a full examination of all of the pertinent available documents. The Air Force's letter of February 28, 1956, advised petitioner that the documents on file would be made available to him (D. Ex. 3). Indeed, petitioner's thirteen-page answer to the charges demonstrates that he examined the documents upon which the charges were predicated (D. Ex. 2). There is thus firm support for the finding

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[2] An earlier decision of the District of Columbia Circuit upon which petitioner relies, *Mulligan* v. *Andrews*, 211 F. 2d 28 (C.A.D.C.), is not apposite. It was there held that a letter of decision asserting merely "unsuitability" as the basis for dismissal did not meet the requirements of the statute. Nor is the case at bar like *Kutcher* v. *Higley*, 235 F. 2d 505 (C.A.D.C.), where it appeared from the agency's decision that the employee was dismissed on grounds other than those stated in the charges against him.

of the court below that "[a]ccess to all pertinent records was granted [petitioner] and ample opportunity to prepare his replies, even during working hours. Indeed, until this suit the availability of all desired records was unquestioned" (Pet. 11).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
MARK R. JOELSON,
Attorneys.

JANUARY 1960.

APPENDIX

The Lloyd-La Follette Act of 1912, Sec. 6, 37 Stat. 555, as amended, 62 Stat. 354, 5 U.S.C. 652(a) provides, in pertinent part:

> (a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. * * *.

5 C.F.R. 9.102(a)(1) (1949 ed.) provides, in pertinent part:

> No employee, veteran or nonveteran, shall be separated, suspended, or demoted except for such

cause as will promote the efficiency of the service and for reasons given in writing. The agency shall notify the employee in writing of the action proposed to be taken. This notice shall set forth, specifically and in detail, the charges preferred against him. The employee shall be allowed a reasonable time for filing a written answer to such charges and furnishing affidavits in support of his answer. He shall not, however, be entitled to an examination of witnesses, nor shall any trial or hearing be required except in the discretion of the agency. If the employee answers the charges, his answer must be considered by the agency. Following consideration of the answer, the employee shall be furnished at the earliest practical date with a written decision. If the agency determines that removal or other action is warranted, the employee shall be notified in the decision of the reasons for the action taken and its effective date. Copies of the charges, notice of hearing (if any), answer, reasons for removal, or other action, shall be made a part of the records of the department or agency concerned.

5 C.F.R. 9.105 (1949 ed.) provides:

(a) Except as required by section 14 of the Veterans' Preference Act, the Commission shall not investigate or review the sufficiency of the reasons for removal, suspension, reassignment, or demotion of an employee.

(b) The Commission may investigate the removal, suspension, reassignment, or demotion of an employee when such employee establishes a prima facie case that:

(1) The procedure prescribed by the Commission under § 9.102 (a) (1) has not been followed; or

(2) The removal, suspension, reassignment, or demotion was made for political reasons, except as may be required by law, or for religious reasons, or resulted from discrimination because of marital status or race.

(3) No case will be investigated under this paragraph unless the request for such investigation is received by the Commission within ten (10) days from the effective date of separation, suspension, reassignment, or demotion. This time limit may be extended in the discretion of the Commission only upon a showing by the employee that circumstances beyond his control prevented him from filing a request for an investigation within the prescribed ten (10) days. The regulations of the Commission under section 14 of the Veterans' Preference Act of 1944 (Part 22 of this chapter), relating to appeals to the Commission of preference eligibles, are applicable whenever a request is received from a preference eligible to investigate a removal, suspension for more than thirty (30) days, or demotion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 627

FRANK E. MONDAY,
Petitioner

v.

THE UNITED STATES

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1959

No. 627

FRANK E. MONDAY,
Petitioner

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THE UNITED STATES

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant a rehearing of its order of February 23, 1960 denying the petition for a writ of certiorari and that a writ of certiorari issue to review the judgment of The United States Court of Claims in the above entitled case as prayed for in the petition filed on January 4, 1960, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

(1) Petitioner asserts that The Court of Claims erred in not holding that petitioner's dismissal of the Department of the Air Force violated the Performance Rating Act of 1950 (5 U.S.C. Sec. 2005). Petitioner received a satisfactory rating in September 1955, less than six months before the charges were filed against him by the Agency on February 21, 1956. There is definite evidence that the

Department of the Air Force started to proceed with a personnel action against the petitioner under the Performance Rating Act rather than under the provisions of the Lloyd-LaFollette Act (5 U.S.C. Sec. 652). Petitioner submits that when the Agency embarked on this line of action, it was legally and morally bound to proceed with the provisions of the Performance Rating Act of 1950 which require under section 2005 that "no officer or employee shall be rated unsatisfactory without a ninety day prior warning and a reasonable opportunity to demonstrate a satisfactory performance." The Agency's failure to follow this procedure was a violation of the Act since it was obligated to proceed on this basis. There has been no decision by this Court on this question of Federal law although there have been decisions in The United States Courts of Appeal including *Thomas* v. *Ward*, 225 F.2d 953 and *Jones* v. *Hobby*, 223 F.2d 345 which petitioner submits were not controlling here.

(2) The action of the Agency was arbitrary and capricious in that petitioner who was employed by the Agency from 1949 to 1956 received efficiency ratings of satisfactory or better. In September 1955, petitioner was given a satisfactory rating for the previous 12 months. During the period from November 1954 to March 1956, petitioner's duties in the Agency were essentially of the same nature. For nearly half of the years covered by the performance rating given to the petitioner in September 1955 petitioner was engaged in doing work for the Agency which he was later charged with doing inefficiently.

Petitioner was prevented at the grievance appeal hearing from presenting fully his grievance by the action of the hearing officer in denying petitioner the right to have his supervisors testify with respect to the same type of work and duties which he performed efficiently.

The Agency's letter of charges was predicated upon the failure of petitioner to meet certain established ob-

jective standards. Yet at the grievance appeal proceeding no standards were established by the Agency on which the alleged norm was based.

Thus it is submitted that the Court of Claims erred in not holding that the Agency was arbitrary and capricious in that the Agency failed to act fairly and acted without substantial cause which was in violation of the spirit and intent of the Lloyd-Lafollette Act and the Agency's own regulations.

CONCLUSION

For the reasons set forth above and in the petition for the writ of certiorari, it is respectfully urged that a rehearing be granted and that upon such rehearing a writ of certiorari issue to the United States Court of Claims.

DAVID M. KLINEDINST
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay, and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

DAVID M. KLINEDINST
Attorney for Petitioner

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MOTION FILED MAY 2[illegible] 1960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 627

FRANK E. MONDAY,

Petitioner,

v.

THE UNITED STATES

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 627

FRANK E. MONDAY,

Petitioner

v.

THE UNITED STATES

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant his motion for leave to file second petition for rehearing of the Court's order of February 23, 1960 denying the petition for a writ of certiorari to issue to review the judgment of the United States Court of Claims on the above entitled case as prayed for in the petition filed on January 4, 1960, herein. The first petition for rehearing in this case was denied by the Court on April 4, 1960.

REASONS FOR GRANTING THE MOTION

(1) Petitioner asserts that he can show that his removal by the Department of the Air Force was due to discrimination because of petitioner's political and fraternal affiliations as well as his views with respect to the Negro citizens of the United States.

Petitioner has been a life long registered voter in the Commonwealth of Pennsylvania and has always been a

devoted and loyal member of the Democratic Party of that state. Petitioner has also been a member of the Masonic fraternity for the past 29 years. In Pennsylvania he was Master of his Masonic Lodge and representative in the Grand Lodge of the Masonic fraternity. In the District of Columbia, he has been Commander of the Knights' Templar and Master of his Masonic Lodge.

Petitioner has always tried to be tolerant and understanding of the plight and problems of the Negro citizens of this country as well as other racial minority groups. He has never failed to express his views of sympathetic interest in his fellow citizens of the Negro race. He readily associated with Negro co-workers in the Department of the Air Force.

Petitioner is ready to submit affidavits from co-workers to show that the management of the agency was opposed to petitioner and discriminated against him because of his political and fraternal affiliations as well as his views on racial minority groups.

CONCLUSION

For the reasons set forth above and in the petition for the writ of certiorari, it is respectfully urged that the motion for rehearing be granted and that upon such rehearing a writ of certiorari issue to the United States Court of Claims.

DAVID M. KLINEDINST
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I hefeby certify that the foregoing motion for leave to file 2nd petition for rehearing of order denying petition for writ of certiorari is presented in good faith and not for the purpose of delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

David M. Klinedinst
Attorney for Petitioner